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No. 90-455

FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL WOOD PRESERVING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that unfair labor practices by petitioner—a successor employer—and its predecessor prevented the holding of a fair election and therefore warranted entry of a *Gissel* bargaining order against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 905 F.2d 803. The decision and order of the National Labor Relations Board (Pet. App. 48a-51a), including the findings and recommendations of the administrative law judge (Pet. App. 52a-87a), are reported at 288 N.L.R.B. No. 102.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1990. The petition for a writ of certiorari was filed on September 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until June 1984, Burke-Parsons Bowlby (Bowlby) operated a facility for the chemical treatment of wood in Leland, North Carolina. Pet. App. 56a. On June 29, 1984, Bowlby sold the facility, including its production equipment, vehicles, and inventory, to petitioner. *Id.* at 76a.

a. In early February 1984, several of Bowlby's production and maintenance employees engaged in a job walkout and began discussions with representatives of the International Woodworkers of America, AFL-CIO (the Union). Pet. App. 57a. By late February 1984, at least 42 of the 64 employees in the production and maintenance unit had signed petitions authorizing the Union to be their collective bargaining representative. *Id.* at 74a-75a. The Union filed a petition for a representation election, and the Board scheduled one for April 6, 1984. *Id.* at 69a.

After the Union began its organizing campaign, Bowlby officials took numerous actions that later became the basis for unfair labor practice charges. They interrogated employees about their union sympathies; threatened employees with closing and selling the facility, with subcontracting out their work, with losing their benefits and jobs, and with other unspecified reprisals if they chose union representation; promised employees that Bowlby would solve their problems without the Union; enforced work rules more stringently than before the campaign began; disciplined several employees because of their union activity; and packed the bargaining unit with non-union employees to dissipate the Union's majority. Pet. App. 59a-70a.

Specifically, Bowlby's president, Richard Bowlby, stated in a letter to employees that the Union posed a "high risk," and that the employees should consider what the Union might "cost" them and not "vote [themselves] into a sea of trouble." Pet. App. 63a-64a. Richard Bowlby also

warned several employees that, if they voted to have the Union represent them, he would ship work to another facility. *Id.* at 36a.

Bowlby's plant manager, Carl Williams, advised several employees that, if the employees elected union representation, they "might as well start looking for another job." Pet. App. 59a-60a.

Bowlby's supervisors issued similar threats. Bowlby supervisor Percy Burns told an employee that, if the Union was elected, Bowlby would close the facility. Pet. App. 61a. Bowlby supervisor Jimmie Smith asked two employees whether they supported the Union and told them that the employees should "get ready to plant a garden because [they] were all going to be on the soup line"; Smith also said that Bowlby would close and sell the facility if the employees elected union representation. *Id.* at 60a. Smith warned at least three other employees that the employees were "going to wind up in the soup line" if the Union was elected. *Id.* at 61a.

Bowlby supervisors Smith, Gary Wood, and Bill Caldwell each held conversations with employees to advise them that they would lose benefits if they elected the Union. Pet. App. 59a, 61a.

Bowlby's production manager, Thomas Greene, issued disciplinary warnings to four employees because of their union activity. Pet. App. 64a-69a. Greene also suspended one of these employees, who was among the earliest and most vocal supporters of the Union, because of his union activity. *Id.* at 66a-67a.

A few days before the election was to occur, in an effort to dissipate the Union's majority status, Bowlby's management brought in about 25 employees from out of state and put them on the list of employees eligible to vote in the election. Pet. App. 69a-70a.

In response to Bowlby's actions, the Union filed unfair labor practice charges with the Board, thereby blocking the scheduled election. Pet. App. 58a, 69a.

b. On June 20, 1984, Stanley Winbourne, the president of petitioner and a former official of Bowlby, addressed Bowlby's employees. Pet. App. 70a. He told them that petitioner was purchasing Bowlby. *Ibid.* He said that he did not favor the Union, but that it was their decision to make. *Ibid.* He assured them that petitioner would hire each of them and that each would start with a "clean slate[ ]." *Ibid.*

On June 28, 1984, the Union sent a telegram to Winbourne, advising him that it continued to represent a majority of Bowlby's production and maintenance employees and informing him of the unfair labor practices committed by Bowlby. Pet. App. 70a-71a. The Union also demanded that petitioner recognize the Union as the production and maintenance employees' collective bargaining representative. *Ibid.*; see also *id.* at 23a.

On June 29, 1984, petitioner purchased Bowlby's assets and hired Bowlby's line supervisors. Pet. App. 76a. Petitioner also retained Greene as production manager, who, as discussed, had disciplined several Bowlby employees for supporting the Union. *Ibid.* In early July, petitioner began hiring production and maintenance employees; Greene was responsible for making hiring recommendations. *Id.* at 73a. Petitioner refused to hire several former Bowlby employees because of their union activity. *Id.* at 70a-74a.

By the end of July 1984, petitioner had hired employees in nearly all of Bowlby's pre-existing production and maintenance classifications. Pet. App. 76a. At that time, a majority of petitioner's 44 production and maintenance employees were previous Bowlby employees. *Ibid.*

Petitioner began operations on July 9, 1984. Pet. App. 76a. It operated out of Bowlby's former facility, serviced

Bowlby's former customers, and made the same products that Bowlby had made. *Ibid.*

2. The Board adopted the findings and conclusions of the administrative law judge that, through the actions described above, petitioner and Bowlby had violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (3). Pet. App. 48a-49a, 59a-74a. The Board also affirmed the ALJ's finding that petitioner was a successor employer because it had continued Bowlby's business essentially unchanged, had hired a production and maintenance work force the majority of which was previously employed by Bowlby, and had purchased Bowlby with notice of its unfair labor practices. *Id.* at 48a-49a, 59a-70a, 76a-80a (citing *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973)). The Board ordered petitioner and Bowlby to recognize and bargain with the Union as the representative of the production and maintenance employees. Pet. App. 80a-83a.[1]

The Board agreed with the ALJ that the unfair labor practices of petitioner and Bowlby combined to make a fair election unlikely. Pet. App. 49a-50a, 76a-77a. The Board found that petitioner "commenced its takeover of predecessor Bowlby by discriminatorily refusing to hire known union activists and by committing that violation through Production Manager Thomas Greene, who had

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[1] The Board entered an order on May 12, 1988, that was directed only at petitioner. Pet. App. 51a, 80-83a. On September 30, 1988, the Board entered another order that was directed at both petitioner and Bowlby but was otherwise in relevant part identical to its previous order. See *id.* at 2a n.3. In addition to directing petitioner and Bowlby to bargain with the Union, the Board's order directed them to cease and desist from engaging in unfair labor practices, to expunge the files of the unlawfully disciplined employees and make them whole, and further ordered petitioner to offer to hire the seven individuals whom petitioner had unlawfully refused to hire. *Id.* at 80a-83a.

held the same position with the predecessor." *Id.* at 50a. The Board concluded:

> [W]hatever might be the case had [petitioner] wiped the slate clean and hired an entirely new managerial and supervisory complement, the employees here had received the plain message that supporting the Union was a dangerous proposition regardless of who the employer was.

Ibid.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-47a.

The court affirmed the Board's determination that a *Gissel* order[2] was warranted in light of the unfair labor practices of Bowlby and petitioner. The court, like the Board, reasoned that Bowlby's "numerous unfair labor practices," standing alone, made a fair election unlikely. Pet. App. 43a-44a. The court also agreed that, by refusing to hire several former Bowlby employees because of their union activity, petitioner had "added its own conduct that tended to have a lasting inhibitive effect on the employees' formulation and expression of free choice regarding unionization." *Id.* at 44a; see also *id.* at 33a-35a. The court recognized that "an election, and not a bargaining order, is the traditional and preferred method for determining the bargaining agent for employees." *Id.* at 46a. But the court concluded that, notwithstanding the absence of an election, the Board acted within its discretion in entering a bargaining order, because

> [W]here, as here, "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present is slight and . . . employee sentiment once expressed

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[2] *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

> through cards would, on balance, be better protected by a bargaining order, then such order should issue."

Id. at 46a-47a (quoting *Gissel Packing Co.*, 395 U.S. at 614-615).

The court also upheld the Board's determination that the order should extend to petitioner as the successor to Bowlby. Pet. App. 33a-44a. The court held that substantial evidence supported the Board's finding that petitioner carried on Bowlby's business essentially unchanged (*id.* 35a), had actual notice of Bowlby's unfair labor practices (*id.* at 20a-27a), and hired a majority of Bowlby's former production and maintenance employees (*id.* at 35a-40a). The court further held, contrary to petitioner's contention, that in entering the order against petitioner the Board was "not required specifically" to identify "the precise percentage of union support that existed in [petitioner's] newly constituted unit." *Id.* at 36a.[3]

ARGUMENT

Despite petitioner's broadside attack on the court of appeals' decision, the only issue actually presented in this case is narrow and fact-specific: whether the court below properly enforced a *Gissel* bargaining order entered by the Board against petitioner, a successor employer, based on the Board's conclusion that unfair labor practices by peti-

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[3] The court also found applicable the principle that an employer "may not defeat a finding of successorship through its own discrimination." Pet. App. 38a n.32 (quoting *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 625 (6th Cir. 1987)). The court observed that here it could "be said with far greater likelihood than not that a majority of the employees in [petitioner's] unit would have been found to have signed the petitions opting for union representation but for [petitioner's] discriminatorily having refused to hire the seven [former Bowlby employees] who had signed the petitions." Pet. App. 39a.

tioner and its predecessor precluded the holding of a fair election. In enforcing the Board's order, the court correctly applied established legal principles to findings of the Board that were supported by substantial evidence. Petitioner's fact-bound challenge thus does not warrant this Court's review.

1. In *Gissel Packing Co.*, 395 U.S. at 613-614, the Court held that in two situations the Board has discretion to order an employer to bargain with a union that has not been selected as the employees' bargaining representative through an election: in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In the latter situation, there must be a showing, whether through authorization cards or otherwise, "that at one point the Union had a majority." *Id.* at 614. The Board must also determine "that the possibility of erasing the effects of past practices and of ensuring a fair election . . . is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615. This determination, the Court emphasized,was primarily one for the Board, not reviewing courts, to make. *Id.* at 612 n.32.

The Board in this case made the findings necessary to support a *Gissel* order, and these findings were properly upheld by the court of appeals. The Board found that the Union obtained authorization cards from a majority of Bowlby's employees (Pet. App. 74a-75a), and that Bowlby's employees made up the majority of petitioner's work force (*Id.* at 76a). The Board also found that, in response to the Union's organizing campaign, Bowlby committed numerous unfair labor practices, including unit

packing and threats of plant closure, job loss, and subcontracting. *Id.* at 57a-70a, 75a-76a. These practices, the Board determined, made the holding of a fair election unlikely. *Id.* at 75a-76a.[4] And when petitioner succeeded Bowlby, the Board further found, petitioner too engaged in conduct "clearly calculated to subvert the election process" by "unlawfully refusing to hire known union adherents." *Id.* at 77a.[5] These findings were amply supported by record evidence and were therefore properly sustained by the court of appeals.[6]

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[4] Petitioner disputes (Pet. 10-11) the Board's assessment that these practices precluded the holding of a fair election. As the court below recognized (Pet. App. 39a-44a), that assessment was well within the Board's discretion to make. *Gissel*, 395 U.S. at 612 n.32. The unfair labor practices committed by Bowlby were comparable to those found to justify issuance of *Gissel* orders in other cases. See, e.g., *NLRB* v. *Air Products & Chemicals Inc.*, 717 F.2d 141, 144-147 (4th Cir. 1983); *Piggly Wiggly, Tuscaloosa Div.* v. *NLRB*, 705 F.2d 1537, 1540-1543 (11th Cir. 1983); *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980).

[5] Contrary to petitioner's assertion (Pet. 10), the Board did not enter the bargaining order against it based solely on the unfair labor practices committed by Bowlby; the Board also took into account petitioner's unlawful refusal to hire seven former Bowlby employees who supported the Union. Pet. App. 77a. The Board likewise considered this unfair labor practice by petitioner in determining that the chance of a fair election was slight. *Ibid.* Petitioner is therefore incorrect when it asserts (Pet. 10) that this determination was based solely on the fact of petitioner's purchase of Bowlby's business.

[6] Consistent with the Board's reasoning, the court below considered both Bowlby's and petitioner's unfair labor practices in enforcing the Board's order against petitioner. Pet. App. 39a-44a. The court's enforcement of the order therefore was not, as petitioner asserts (Pet. 11), based on a "novel and entirely independent rationale."

The Board properly entered the *Gissel* order against both Bowlby and petitioner upon determining that petitioner was Bowlby's successor (Pet. App. 76a-77a) and that petitioner had notice of Bowlby's unfair labor practices (*id.* at 77a). In this Court, petitioner challenges only the latter determination. See Pet. 20-24.[7] This fact-bound challenge does not warrant this Court's review. In any event, the Board's finding of notice was amply supported by evidence, *inter alia,* that petitioner was (1) aware of the Union's organizing campaign and of Bowlby's response to the campaign, (2) knew that at least one unfair labor practice charge had been filed against Bowlby, and (3) received a telegram informing it of Bowlby's unfair labor practices before it purchased Bowlby. Pet. App. 20a-24a.

2. Petitioner's contention (Pet. 12-15) that the Board erroneously failed to consider events occurring after the commission of the unfair labor practices is without merit. The Board found (Pet. App. 76a) that petitioner had commenced its takeover of Bowlby without making significant changes in Bowlby's managerial and supervisory force—which had committed numerous unfair labor practices—and then, acting through one of the

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[7] Rather than disputing that it is a "successor" under the doctrine of successorship articulated by this Court, petitioner urges (Pet. 22-24) this Court to address "the farthest extent" of that doctrine. This case does not present an occasion for doing so, because the Board's extension of a *Gissel* bargaining order to petitioner was fully consistent with precedent. See *Carlton's Market*, 243 N.L.R.B. 837, 845 (1979), enforced, 642 F.2d 350 (9th Cir. 1981). Compare *NLRB* v. *Cott Corp.*, 578 F.2d 892, 893-896 (1st Cir. 1978), denying enforcement to 232 N.L.R.B. 312 (1977) (finding extension of *Gissel* bargaining order to successor inappropriate where successor hired all the predecessor's employees, remedied all of the predecessor's Section 8(a)(1) and (3) violations, 29 U.S.C. 158(a)(1) and (3), and committed no violations of its own).

predecessor's supervisors, had unlawfully refused to hire seven former Bowlby employees. Thus, "whatever might be the case had [petitioner] wiped the slate clean and hired an entirely new managerial and supervisory complement, the employees here had received the plain message that supporting the Union was a dangerous proposition regardless of who the employer was" (*id.* at 49a-50a). Accordingly, it was reasonable for the Board to conclude that, regardless of events occurring after the unfair labor practices, a fair election was not possible and a bargaining order should issue. *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 265 (3d Cir. 1982); *Bandag, Inc.* v. *NLRB*, 583 F.2d 765, 772 (5th Cir. 1978); *NLRB* v. *Ace Comb Co.*, 342 F.2d 841, 844 (8th Cir. 1965); *Granite City Journal*, 262 N.L.R.B. 1153, 1158 (1982).[8]

3. Likewise without merit is petitioner's contention (Pet. 16-18) that the Board could not enter a bargaining order against petitioner without finding that the Union was supported by the majority of petitioner's employees. The Board found that the Union enjoyed majority support among Bowlby's employees and that petitioner hired a work force the majority of which had previously worked for Bowlby. Pet. App. 49a-51a, 76a. As the court below recognized (*id.* at 36a), the Board was not required to identify "the precise percentage of union support that existed in [petitioner's] newly constituted unit." A successor

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[8] Petitioner refers to only two "significant" events that it claims the ALJ did not consider: that petitioner did not hire "the two Bowlby officials who were most outspoken in espousing anti-union sentiment"; and that, although petitioner hired seven supervisors who had committed unfair labor practices while employed by Bowlby, several of these supervisors later left petitioner's employ. Pet. 15. There is no basis for petitioner's assertion (*ibid.*) that the ALJ "apparently disregard[ed]" these facts. These facts, in any event, could reasonably have been accorded little significance.

employer's bargaining obligation depends on its hire of a majority of the predecessor's employees, not on its hire of a majority of union adherents. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41, 52 (1987).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The court below went on to conclude that it was likely that a majority of petitioner's employees would have signed the union petitions but for petitioner's discriminatory hiring. Pet. App. 36a-39a. This conclusion was merely dictum in light of the court's holding that the Board was not required to determine the percentage of union adherents in petitioner's work force. Petitioner is therefore incorrect in asserting (Pet. 18-22) that in reaching this conclusion the court violated the principle of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282 061/20200